Not Designated for Publication

DIVISION I

CA 06-1126

May 23, 2007

GEORGE T. WEAVER, JR.
APPELLANT

APPEAL FROM THE PULASKI COUNTY CIRCUIT COURT
[NO. ECN-1986-4974]

V.

HONORABLE RAYMOND C. KILGORE, JUDGE

KAY M. WEAVER (MCCLANAHAN)
APPELLEE

AFFIRMED

Appellant George Weaver brings this appeal from the entry of a qualified domestic relations order (QDRO) approximately nineteen years after his divorce from appellee Kay M. Weaver (now McClanahan). Appellant raises three points in support of his argument that the QDRO was an impermissible modification of the divorce decree. We find no merit in appellant's arguments and affirm.

The parties' divorce decree was filed of record on July 9, 1987. The decree incorporated a property-settlement agreement that dealt with appellant's retirement in paragraph six, which provided:

> That [appellee] shall receive one-half of [appellant's] vested retirement pay, plus any earnings on her one-half, as though he had retired the date of the entry of this Decree and was eligible to receive it and shall not participate in any retirement benefits earned or deposited by [appellant] or for his use and benefit after entry of this Decree.
>
> [Appellant] currently has certain rights and benefits in a qualified benefit plan maintained by Financial Institutions Retirement Fund. This agreement is intended by the parties to be a qualified domestic relations order as defined in Section 414 (p) of the Internal Revenue Code of 1954 as amended.

Sometime in 2005, appellee made inquiries to the plan administrator about receiving her share

of appellee's retirement. She forwarded a copy of the divorce decree to the plan administrator, but it was not accepted as a valid QDRO. Appellee then proposed the entry of a QDRO that was based on a model sent to her by the plan administrator. Appellant objected to the proposed order, arguing that it impermissibly modified the divorce decree. This dispute was set down for a hearing.

Appellant testified that he quit the job the retirement account was associated with soon after the divorce. Though he became eligible to draw on the fund when he turned forty-five, he had elected not to do so. He testified that the phrase "retirement pay" was significant to him when the property-settlement agreement was being negotiated. According to appellant, the words "retirement pay" reflected the intention that appellee would receive half of the retirement payments he received, if and when he elected to receive any. Appellant argued that the order proposed by appellee modified the decree by allowing her to receive distributions independently of him.

Appellee testified that it was her understanding of the provision that she would receive her share of appellant's retirement at the time appellant became eligible to receive it. She had believed that sixty-two was appellant's retirement age under the plan, and she explained that she had contacted the plan administrator a couple of months before appellant's sixty-second birthday to arrange for the distribution of her share. Appellee argued that the proposed order accurately reflected the intent of the property-settlement agreement.

The trial court entered the proposed QDRO prepared by appellee on June 23, 2006. The order permitted appellee to begin receiving her fifty-percent share, as measured by the date of the divorce, plus the earnings on her share. It also allowed her to designate a beneficiary[1] to receive distributions in the event of her death.

Appellant argues on appeal that the language of the divorce decree is not ambiguous and

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[1] It appears from the record that the designated beneficiary is the parties' daughter.

expresses the clear intention that appellee may only reap her share of his retirement from the payments he actually receives. In making this argument, appellant points out that there are two primary ways of dividing retirement benefits, depending on how the QDRO[2] is drafted: one called the "shared payment" approach, and the other referred to as the "separate share" approach. Under a shared payment approach, only the participant's stream of income is divided and the alternate payee is not actually given a portion of the actual retirement benefit. *Eller v. Bolton,* 895 A.2d 382 (Ct. Spec. App. Md. 2006). Therefore, the alternate payee's right to receive payment is dependent upon the participant's receipt of payments under the plan. *Id.* By contrast, under the separate share approach the participant's actual retirement benefit is divided, and the alternate payee is permitted to receive a portion of the retirement benefit to be paid at a time and in a form different from that chosen by the participant. *Id. See also,* Sal L. Tripodi, *The ERISA Outline Book,* ch. 1, part A4 (2006); Pamela D. Perdue, *Pension and Welfare Benefit Administration Guidelines,* 62 ALI-ABA 743 (1998).[3] Appellant argues that the decree embodied the shared payment approach and that the trial court improperly modified the decree by entering a QDRO that granted appellee a separate share of his retirement.

A contract provision is ambiguous if it is susceptible of two reasonable interpretations. *McKay Properties, Inc. v. Alexander & Associates,* 63 Ark. App. 24, 971 S.W.2d 284 (1998). Here, appellant focused on the words "retirement pay" to support his position, while appellee relied on the

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[2] A QDRO is defined as a domestic relations order which creates or recognizes the existence of an alternate payee's right to receive all or a portion of the benefits payable to a participant in a pension plan. *Mitchell v. Mitchell,* 40 Ark. App. 81, 842 S.W.2d 66 (1992).

[3] According to the author, a separate share QDRO is often preferred where the order seeks to divide a pension as part of marital property as opposed to providing for support payments.

remaining language in the provision to support her interpretation. Because the language is capable of differing interpretations, we disagree with appellant's assertion that the provision was free of ambiguity. Given the ambiguity, the meaning of the provision was a question of fact for the trial court to determine. *Hickman v. Kralicek Realty & Construction Co.,* 84 Ark. App. 61, 129 S.W.3d 317 (2003). Decisions sounding in equity are reviewed de novo on appeal and are not reversed unless we find that the trial court's decision is clearly erroneous. *Abbott v. Abbott,* 79 Ark. App. 413, 90 S.W.3d 10 (2002).

Applying this standard, we can find no fault with the trial court's interpretation. The language of the decree indicates that appellee was to receive one half of appellant's retirement as of the date of the divorce, plus any future earnings on her share. Appellant was also to receive one half of his retirement, plus any future contributions and earnings. We believe that it was reasonable for the trial court to conclude that appellee was intended to receive her share separate and apart from appellant. Had the parties intended to divide each payment in half, as appellant suggests, appellee would not get the benefit of the earnings on her share. In our view, the trial court's interpretation properly harmonizes the language used based on the entire context of the provision without unduly emphasizing one word or phrase. *See Sturgis v. Skokos,* 335 Ark. 41, 977 S.W.2d 217 (1998). We cannot say that its finding is clearly erroneous.

We also do not consider the trial court's entry of a QDRO past the ninety-day deadline found in Ark. R. Civ. P. 60 to be an improper modification of the decree. Trial courts have an inherent power to enter orders correcting their judgments where necessary to make them speak the truth and reflect actions accurately. *Harrison v. Bradford,* 9 Ark. App. 156, 655 S.W.2d 466 (1983). However, this power is confined to correction of the record to make it conform to the action that was actually taken at the time, but does not permit a decree or order to be modified to provide for action

that the court, in retrospect, should have taken but which, in fact, did not take. *Jones v. Jones,* 26 Ark. App. 1, 759 S.W.2d 42 (1988). Although the parties in this instance intended the decree to serve as a valid QDRO, the plan administrator did not accept it as such. Thus, it was necessary for the trial court to enter an acceptable order to effectuate the terms of the decree.

Appellant's reliance on *Tyer v. Tyer*, 56 Ark. App. 1, 937 S.W.2d 667 (1997), is misplaced. There, the divorce decree did not mention or purport to divide the husband's retirement account, and we held that it was a violation of Rule 60 to amend the decree over a year later to include a division of his retirement. In this case, however, the decree did make a division of the appellant's retirement benefits. The trial court's order did not alter the decree but instead interpreted the decree and clarified the meaning of the provision dividing appellant's retirement. Entering an order to interpret the decree and to enforce its terms falls squarely within the trial court's authority to make the record speak the truth. *Hapney v. Hapney,* 37 Ark. App. 100, 824 S.W.2d 408 (1992); *Ford v. Ford,* 30 Ark. App. 147, 783 S.W.2d 879 (1990); *Cox v. Cox,* 17 Ark. App. 93, 704 S.W.2d 171 (1986). Because there was no modification of the decree, appellant's argument is without merit.

We also reject appellant's argument that the trial court erred by allowing appellee to designate a beneficiary to receive her share upon her death. As we have held, the decree granted appellee a separate property interest in appellant's retirement. Because it is her property, she can dispose of it as she sees fit. *Divich v. Divich,* 665 N.W.2d 109 (S.D. 2003). *See also, e.g., Shelstead v. Shelstead,* 66 Cal. App.4th 893, 78 Cal. Rptr. 365 (Cal. Ct. App. 1988); *cf., Boggs v. Boggs,* 520 U.S. 833 (1997); *Ablamis v. Roper,* 937 F.2d 1450 (9th Cir. 1991).

Affirmed.

GLOVER and MARSHALL, JJ., agree.